

EXHIBIT 3

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HDI-GERLING AMERICA INSURANCE COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 FIREMAN'S FUND INSURANCE) CASE NO.: 3:07-cv-06302-CRB
11 COMPANY, a foreign corporation a/s/o)
12 BASIC RESOURCES, INC. and GEORGE)
13 REED, INC., a foreign corporation,)
14 Plaintiff,)
15 vs.)
16 GERLING AMERICA INSURANCE)
17 COMPANY, a foreign corporation,)
18 Defendant.)
19 DEFENDANT GERLING AMERICA)
20 INSURANCE COMPANY'S NOTICE OF)
21 MOTION AND MOTION FOR LEAVE OF)
22 COURT TO FILE SECOND AMENDED)
23 COMPLAINT [F.R.C.P 15(a)(2)]
24 Date: August 1, 2008
25 Time: 10:00 a.m.
26 Courtroom: 8

19 TO THE HONORABLE COURT AND TO PLAINTIFF AND ITS COUNSEL OF
20 RECORD:

21 PLEASE TAKE NOTE THAT, on August 1, 2008, at 10:00 a.m., or as soon thereafter as
22 the matter may be heard in Courtroom 8 before the Honorable Judge Charles R. Breyer at the
23 above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94012,
24 Defendant Gerling America Insurance Company will and hereby do move this Court as follows:

25 For an order granting Defendant Gerling leave to file its Second Amended Answer.

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Defendant Gerling's Motion for Leave of Court to File Second Amended Answer
3:07-cv-06302-CRB

1 This motion is based on the Notice of Motion, Memorandum of Points and Authorities filed
2 herewith, the Declaration of Tino X. Do, the pleadings and papers filed herein, the pleadings and
3 records in this case, and such other matters as the Court may deem appropriate.

4

5 Dated: June 27, 2008

BARGER & WOLEN LLP

6

7 By: /s/ Tino Do
8 THOMAS R. BEER
9 TINO X. DO
10 Attorneys for Defendant GERLING
11 AMERICA INSURANCE COMPANY

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Defendant Gerling's Motion for Leave of Court to File Second Amended Answer
3:07-cv-06302-CRB

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Defendant Gerling America Insurance Company (“Gerling”) moves this Court for leave to file its Second Amended Answer.

2. ARGUMENT

A. Plaintiff Will Not Suffer Any Prejudice With the Filing of This Amended Answer

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be freely given “when justice so requires.” Federal policy strongly favors determination of cases on their merits, and leave to amend pleadings is freely given unless the opposing party makes a showing of undue prejudice, or bad faith or dilatory motive on the part of the moving party. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In this case, Gerling's only amendments to its Answer is the withdraw of the affirmative defenses of "Damage to Your Property Exclusion" and "Exhaustion of Policy Limits." Amendment is necessary because Gerling has determined that these affirmative defenses are not applicable to the claims at issue in this case. Given that this amendment only means that Plaintiff Fireman's Fund Insurance Company ("FFIC") has two less affirmative defenses to overcome, FFIC cannot claim prejudice, bad faith or dilatory motive with this amendment. Additionally, the issue of futility of amendment is not applicable in this situation where the amendment simply withdraws affirmative defenses.

3. CONCLUSION

For the foregoing reasons, Gerling respectfully requests that the Court grant Gerling leave to file its Second Amended Answer.

Dated: June 27, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do
THOMAS R. BEER
TINO X. DO
Attorneys for Defendant GERLING
AMERICA INSURANCE COMPANY

Motions

3:07-cv-06302-CRB Fireman's Fund Insurance Company et al v. Gerling America Insurance Company

ADRMOP, E-Filing, REFDISC

U.S. District Court
Northern District of California
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The following transaction was received from by Do, Tino entered on 6/27/2008 12:38 PM and filed on 6/27/2008

Case Name: Fireman's Fund Insurance Company et al v. Gerling America Insurance Company
Case Number: 3:07-cv-6302
Filer: Gerling America Insurance Company
Document Number: 52

Docket Text:

**MOTION for Leave to File GERLING AMERICA INSURANCE COMPANY'S NOTICE OF
MOTION AND MOTION FOR LEAVE OF COURT TO FILE SECOND AMENDED
COMPLAINT [F.R.C.P. 15(a)(2)] filed by Gerling America Insurance Company. Motion
Hearing set for 8/1/2008 10:00 AM in Courtroom 8, 19th Floor, San Francisco. (Do, Tino)
(Filed on 6/27/2008)**

3:07-cv-6302 Notice has been electronically mailed to:

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CAND-ECF

Page 2 of 2

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3:07-cv-6302 Notice has been delivered by other means to:

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: J:\office2\29218\011\08 PDF\Gerling America Insurance Company's Notice of Motion and Motion for Leave of Court to File Seocnd Amended Complaint.pdf

Electronic document Stamp:

[STAMP CANDStamp_ID=977336130 [Date=6/27/2008] [FileNumber=4494533-0]
[aa6cale8b4cd075ca21be1ecb672294a1fd0fa59f9fcbdd0e5aa0c35094e709d4ecb0
9cd6077e44eb98633d5ad0c4ef32db81f4b0ee6fcf11ccfda31b9c6d3b1]]

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 6 GERLING AMERICA INSURANCE COMPANY

7 **UNITED STATES DISTRICT COURT**
 8 **NORTHERN DISTRICT OF CALIFORNIA**

9
 10 FIREMAN'S FUND INSURANCE) CASE NO.: 3:07-cv-06302-CRB
 11 COMPANY, a foreign corporation a/s/o)
 12 BASIC RESOURCES, INC. and GEORGE) DEFENDANT GERLING AMERICA
 13 REED, INC., a foreign corporation,) INSURANCE COMPANY'S SECOND
 14 Plaintiff,) AMENDED ANSWER TO PLAINTIFF'S
 15 vs.) FOURTH AMENDED COMPLAINT
 16 GERLING AMERICA INSURANCE)
 17 COMPANY, a foreign corporation,)
 18 Defendant.)
 19
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Defendant Gerling America Insurance Company ("Gerling") responds to Plaintiff's Fourth Amended Complaint at follows:

1. Answering paragraph 1 of the Fourth Amended Complaint, Gerling is informed and believes, and on such basis admits that Plaintiff Fireman's Fund Insurance Company ("FFIC") is a California insurance corporation, that FFIC is registered throughout the States, and that FFIC is authorized to conduct business in the State of California.

2. Answering paragraph 2 of the Fourth Amended Complaint, Gerling is informed and believes, and on such basis admits that FFIC insured Basic Resources and George Reed, California corporations. Except as admitted, Gerling lacks sufficient information or belief to admit or deny such allegations and, on that basis, denies all of them.

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DEFENDANT SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT
 CASE NO.: 3:07-CV-06302-CRB

1 3. Answering paragraph 3 of the Fourth Amended Complaint, Gerling is informed and
 2 believes, and on such basis admits that FFIC made payment to Basic Resources and George Reed
 3 with respect to a claim for property damage due to an explosion of a 12,000 pound Stationary
 4 Asphalt Batch Plant ("Plant"). All other allegations in paragraph 3 are legal not factual and
 5 therefore no response is required, or are denied.

6 4. Answering paragraph 4 of the Fourth Amended Complaint, Gerling admits that it is
 7 an insurance company existing under the laws of the State of New York, that it is registered with the
 8 California Department of Insurance, and that it insures Gencor Industries, Inc. ("Gencor") under a
 9 Commercial Lines Policy, policy number 4003-527-GLP ("Gerling Policy").

10 5. Answering paragraph 5 of the Fourth Amended Complaint, Gerling admits that this
 11 Court has original diversity jurisdiction of this matter pursuant to 28 U.S.C. § 1332.

12 6. Answering paragraph 6 of the Fourth Amended Complaint, Gerling admits that
 13 venue is proper in this Court.

14 7. Answering paragraph 7 of the Fourth Amended Complaint, Gerling is informed and
 15 believes, and on such basis admits that in February 2000, Gencor entered into a written contract
 16 with Basic Resources and George Reed for the purchase of the Plant.

17 8. Answering paragraph 8 of the Fourth Amended Complaint, Gerling is informed and
 18 believes, and on such basis admits that Gencor sold the Plant to Basic Resources and George Reed
 19 for \$1,989,679.00 and provided technical services including "start-up" for operation of the Plant.

20 9. Answering paragraph 9 of the Fourth Amended Complaint, Gerling is informed and
 21 believes, and on such basis admits that the Plant exploded.

22 10. Answering paragraph 10 of the Fourth Amended Complaint, Gerling lacks sufficient
 23 information or belief to admit or deny such allegations and, on that basis, denies all of them.

24 11. Answering paragraph 11 of the Fourth Amended Complaint, Gerling admits that
 25 FFIC sued Gencor in a Florida state court.

26 12. Answering paragraph 12 of the Fourth Amended Complaint, Gerling alleges that it
 27 defended Gencor in the state court action pursuant to an express reservation of rights, and that,

1 following trial, a jury returned its verdict in favor of FFIC determining that Gencor breached its
2 contract with Basic Resources and George Reed and that Gencor was 60% negligent and Basic
3 Resources and George Reed were 40% negligent for the explosion.

4 13. Answering paragraph 13 of the Fourth Amended Complaint, Gerling alleges that a
5 *non in personam* Amended Final Judgment was entered in favor of FFIC in the amount of
6 \$1,751,913.10, and that this was judgment cannot be personally executed against Gencor.

7 14. Answering paragraph 14 of the Fourth Amended Complaint, Gerling alleges a *non in*
8 *personam* Final Judgment awarding costs in the amount of \$42,000 was entered in the state court
9 action, and that this judgment cannot be personally executed against Gencor.

10 15. Answering paragraph 15 of the Fourth Amended Complaint, Gerling admits that it
11 has denied FFIC's claims for coverage under the Gerling Policy. Except as admitted, Gerling
12 denies such allegations.

13 16. Answering paragraph 16 of the Fourth Amended Complaint, Gerling denies all such
14 allegations.

15 17. Answering paragraph 17 of the Fourth Amended Complaint, Gerling admits that the
16 law of the State of Florida applies to the interpretation of the terms of the Gerling Policy in this
17 action.

18 18. Answering paragraph 18 of the Fourth Amended Complaint, Gerling denies all such
19 allegations.

COUNT I – DECLARATORY RELIEF

19. Answering paragraph 19 of the Fourth Amended Complaint, Gerling incorporates by
reference paragraphs 1-18 of this Answer.

23 20. Answering paragraph 20 of the Fourth Amended Complaint, Gerling denies all such
24 allegations. Gerling specifically denies that it has any duty to satisfy the Amended Final Judgment.

25 21. Answering paragraph 21 of the Fourth Amended Complaint, Gerling denies all such
26 allegations.

22. Answering paragraph 22 of the Fourth Amended Complaint, Gerling denies all such allegations.

23. Answering paragraph 23 of the Fourth Amended Complaint, Gerling denies all such allegations.

COUNT II – BREACH OF CONTRACT

24. Answering paragraph 24 of the Fourth Amended Complaint, Gerling incorporates by reference paragraphs 1-23 of this Answer.

25. Answering paragraph 25 of the Fourth Amended Complaint, Gerling denies all such allegations. Gerling specifically denies that it has any duty to satisfy the Amended Final Judgment.

26. Answering paragraph 26 of the Fourth Amended Complaint, Gerling denies all such allegations.

27. Answering paragraph 27 of the Fourth Amended Complaint, Gerling denies all such allegations.

28. Answering paragraph 28 of the Fourth Amended Complaint, Gerling denies all such allegations.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State Claim)

1. The Fourth Amended Complaint and all claims for relief therein fail to state facts sufficient to state a claim against Gerling.

SECOND AFFIRMATIVE DEFENSE

(Lack of Standing)

2. FFIC lacks standing to assert a claim for coverage under the Gerling Policy.

THIRD AFFIRMATIVE DEFENSE

(No Coverage)

3. The Gerling Policy does not provide coverage for the loss and damages claimed by FFIC.

FOURTH AFFIRMATIVE DEFENSE**(No Coverage for Underlying State Court Action)**

4. The Gerling Policy does not provide coverage for the alleged losses claimed in the underlying state court action by reason of the policy's terms, conditions, defenses and exclusions.

FIFTH AFFIRMATIVE DEFENSE**(Condition Precedent to Coverage)**

5. FFIC fails to meet one or more of the conditions precedent to coverage under the Gerling Policy with respect to the claims alleged in the Fourth Amended Complaint.

SIXTH AFFIRMATIVE DEFENSE**(*Non In Personam* Judgment)**

6. The Amended Final Judgment that underlies FFIC's claim for coverage under the Gerling Policy is not "*in personam*" against Gencor and therefore does not provide any right to coverage under the Gerling Policy as Gencor is not "legally obligated to pay" the judgment.

SEVENTH AFFIRMATIVE DEFENSE**(Final Amended Judgment)**

7. The Amended Final Judgment does not give rights to coverage under the Gerling Policy as a judgment for damages has not been entered against Gencor.

EIGHTH AFFIRMATIVE DEFENSE**(Contractual Liability Exclusion)**

8. FFIC's claims are barred, in whole or in part, pursuant to the contractual liability exclusion of the Gerling Policy in that the underlying verdict obtained by FFIC as against Gencor is predicated upon a contractual liability allegedly deriving out of Gencor's contract with Basic Resources and George Reed.

NINTH AFFIRMATIVE DEFENSE**(Damage to Your Product Exclusion)**

9. FFIC's claims are barred, in whole or in part, pursuant to the "Damage to Your Product" exclusion of the Gerling Policy.

TENTH AFFIRMATIVE DEFENSE

(Engineers, Architects or Surveyors Professional Liability Exclusion)

10. FFIC's claims are barred, in whole or in part, pursuant to the "Engineers, Architects or Surveyors Professional Liability" exclusion of the Gerling Policy as Gencor was allegedly obligated under the written contract with Basic Resources and George Reed to provide adequate field engineering service and the damages claimed allegedly arose out of those services rendered by Gencor employees, thereby excluding coverage.

ELEVENTH AFFIRMATIVE DEFENSE

(Damage to Your Work Exclusion)

11. FFIC's claims are barred, in whole or in part, pursuant to the "Damage to Your Work" exclusion of the Gerling Policy as the installation of the Plant was allegedly completed and damages were from the product itself or from the work performed on the product.

TWELFTH AFFIRMATIVE DEFENSE

(Breach of Contract)

13. FFIC's claims are barred because the Gerling Policy does not provide coverage for a breach of contract by the insured.

THIRTEENTH AFFIRMATIVE DEFENSE

(Other Insurance Provision)

14. FFIC's claims are barred, in whole or in part, pursuant to the "Other Insurance" provision of the Gerling Policy.

FOURTEENTH AFFIRMATIVE DEFENSE

(Right to Raise Additional Defenses)

15. Gerling reserves its right to raise additional affirmative defenses and to supplement those asserted herein upon discovery of further information and upon further investigation.

WHEREFORE, Gerling prays for judgment as follows:

1. That FFIC take nothing by reason of the Fourth Amended Complaint;
2. That the Court enter judgment in favor of Gerling, in all respects; and

1 3. That the Court grant Gerling such other and further relief as the Court may deem just
2 and proper.

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5 Dated: June 27, 2008

BARGER & WOLEN LLP

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7 By: /s/ Tino X.Do
8 THOMAS R. BEER
9 TINO X. DO
10 Attorneys for Defendant GERLING
11 AMERICA INSURANCE COMPANY

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DEFENDANT'S SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT
CASE NO.: 3:07-CV-06302-CRB

Other Answers

3:07-cv-06302-CRB Fireman's Fund Insurance Company et al v. Gerling America Insurance Company

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Case Name: Fireman's Fund Insurance Company et al v. Gerling America Insurance Company
Case Number: 3:07-cv-6302
Filer: Gerling America Insurance Company
Document Number: 54

Docket Text:

AMENDED ANSWER to GERLING AMERICA INSURANCE COMPANY'S SECOND AMENDED ANSWER TO PLAINTIFF'S FOURTH AMENDED COMPLAINT [29] Amended Complaint, by Gerling America Insurance Company. (Do, Tino) (Filed on 6/27/2008)

3:07-cv-6302 Notice has been electronically mailed to:

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Page 2 of 2

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Shirley Jean McEachern shirleyjean33409@aol.com

3:07-cv-6302 Notice has been delivered by other means to:

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Original filename: J:\office2\29218\011\08 PDF\Gerling America Insurance Company's Second Amended Answer to Plaintiff's Fourth Amended Complaint.pdf

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[STAMP CANDStamp_ID=977336130 [Date=6/27/2008] [FileNumber=4494612-0]
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